

TEG/LVI Environmental Services, Inc. and Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers International Union of North America, AFL-CIO; and International Association of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO, Petitioner. Case 21-RC-19889

September 30, 1998

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 5 and 6, 1998, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 97 for and 87 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.¹

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

We adopt the hearing officer's finding that the Union did not engage in objectionable conduct by mailing to employees a flyer containing the following statement: "The National Labor Relations Board of the United States of America wants the workers of TEG/LVI environmental services to have a union." As the hearing officer found, the document did not purport to be an official Board document, but rather was clearly identified as one distributed by the Union. Thus, the employees would know that the document emanated from a party and was merely propaganda. The Board has long held that employees are capable of evaluating propaganda for themselves. *SDC Investments*, 274 NLRB 556, 557 (1985).

Our dissenting colleague argues that the Union's conduct is objectionable because it constitutes a misrepresentation about U.S. labor law. It is well settled, however, that misrepresentations as to law are treated in the same manner as other misrepresentations. *Metropolitan Life Insurance Co.*, 266 NLRB 507 (1983).² The Board

will not set aside an election based on the misrepresentation contained in campaign propaganda. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

Our colleague nevertheless contends that the flyer is objectionable because it "falsely informs employees that the NLRB favors one side over the other." Even though the Union is clearly identified as the preparer of the document, he would find the misrepresentation objectionable because the flyer makes a misrepresentation about the neutrality of the NLRB. Thus, it is apparent that our dissenting colleague urges an exception to the well-settled *Midland* doctrine. As the Board has held, however, there is no principled reason for applying a different standard to the flyer at issue here than the Board applies to misstatements contained in campaign propaganda.

Riverview Hospital, 264 NLRB 1094 (1982), expressly treats misstatements about Board neutrality the same as other misrepresentations. In that case, the Board found that a union's misrepresentation concerning the issuance of an unfair labor practice complaint against the employer was not objectionable. The Board's rationale, however, went beyond the specific misrepresentation and considered the union's conduct in the broader context of statements that call into question the Board's neutrality in an election. In finding that such statements did not warrant setting aside an election, the Board characterized such conduct as "only one party's representation of the Board's action," and stated that "[t]he Board's actions speak for themselves, and will show up *any* misrepresentation for what it is." [Emphasis added.] *Riverview Hospital*, supra at 1095. Finally, the Board stated, "we see no sound reason why misrepresentations of Board action should be on their face objectionable or be treated differently than other misrepresentations." Id. Contrary to our colleague, we find this rationale directly applicable to the instant circumstances. Accordingly, we shall overrule the Employer's objection.³

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers International Asbestos and Toxic Abatement Local Union 882, Laborers International Union of North America, AFL-CIO; and International As-

¹ The original tally of ballots showed 94 for and 79 against, with 58 challenged ballots. The parties subsequently stipulated that 40 of the challenged ballots should be sustained and 11 of the challenged ballots should be opened and counted. Thereafter, the revised tally of ballots was completed and served on the parties.

² Our colleague asserts that the Union's conduct is especially reprehensible because "the employees are immigrants who are particularly vulnerable to misrepresentations about our nation's laws." Throughout the period that the Act has been in effect, the nation's work force has included a substantial number of immigrant workers who have fully participated in elections conducted by this Agency. We see no basis for concluding here that immigrant employees should be considered less capable than other employees of evaluating campaign propaganda for

what it is. See generally *London's Farm Dairy*, 323 NLRB No. 126, slip op. at 2 (1997) (not reported in Board volumes) (standard for conducting mail ballot election not different for work force of immigrant workers).

³ In adopting the hearing officer's findings that the flyer was not objectionable, we find no merit to the Employer's contention that the hearing officer relied on an inaccurate translation of another portion of the document from Spanish to English. Moreover, even accepting the Employer's translation of that portion, such a statement, i.e., "The National Labor Relations Board of the United States of America ordered that an election will take place between all of the workers at TEG/LVI Environmental Services, so that they can finally vote for their union . . ." would not be objectionable for the reason set forth above.

sociation of Heat & Frost Insulators & Asbestos Workers Union, Local No. 5, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

All full-time and regular part-time truck drivers, fire proofers, working foremen, maintenance mechanics, demolition and environmental employees employed by TEG/LVI Environmental Services, Inc. and all employees of LVI Environmental Services, Inc. ("LVI" and jointly as "the Employer") during the referenced payroll period employed in these categories [sic], and including but not limited to workers involved in site mobilization, initial site cleanup, site preparation, removal of asbestos-containing material and toxic waste employed by the Employer in the 12 counties of Southern California (Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Barbara Island, San Clemente Island, Santa Rosa Island, Anacapia Island and the Channel Islands Monument); excluding estimators, operations managers, inventory and control employees, sales employees, project engineers, contracts administrators, health and safety officers, professional employees, office clerical employees, guards and supervisors as defined in the Act.

MEMBER HURTGEN, dissenting.

I conclude that the election should be set aside. The Union told employees in a flyer that "The National Labor Relations Board of the United States of America wants the workers of [the Employer] to have a union." The unit employees are mostly immigrants from Latin America, and the flyer was in Spanish.

I think it highly inappropriate for a party to an election to falsely represent to employees that the NLRB favors one side or the other. Although it is inappropriate in any context, it is especially reprehensible where, as here, the employees are immigrants who are particularly vulnerable to misrepresentations about our Nation's laws. Further, the misrepresentation is unlike the kind found non-objectionable in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). This misrepresentation goes to the heart of the integrity of the process, i.e., the neutrality of the Agency that is conducting the election.

My colleagues assert that there is no harm because there is no confusion about the fact that the Union was the party who prepared and distributed the document. My colleagues thereby miss the point. The vice lies not in confusion about the identity of the preparer of the document. The vice lies in the message itself. We simply cannot tolerate conduct which falsely informs employees that the NLRB favors one side over the other.

SDC Investment, 274 NLRB 556, 557 (1985), is consistent with the above analysis. In that case, the Union reproduced a blank NLRB ballot and wrote at the bottom: "Remember to vote Yes on December 16." The Board held that employees might be misled to believe that the Board prepared the document. Thus, employees could reasonably believe that the Board wanted a "yes" vote. However, the Board also made it clear that a different result would have obtained if the employees could have gleaned from the document that it was prepared by the union.

I agree with *SDC*. If the message is simply to vote for the union, and the employees realize that the message comes from the union, there is no harm. Employees would not reasonably think that *the NLRB* wants a pronoun vote. However, the instant case is different. *The document expressly states that the NLRB wants the employees to vote for the union.* The fact that the Union is the sender of that message does not make this message ambiguous.

Riveredge Hospital, 264 NLRB 1096 (1982), is clearly distinguishable. In that case, the misrepresentation was that the U.S. Government had issued a complaint against the company. The truth was that the U.S. Government (i.e., the General Counsel of the NLRB) had *not* issued a complaint. The union had filed a charge, and the matter was settled with a nonadmission clause. The Board held that the misrepresentation was not objectionable. However, unlike the instant case, *Riveredge* does not involve a misrepresentation that the NLRB favors one side over the other.

In sum, this case involves the Board's most precious values—integrity and impartiality. Where, as here, a party undermines these values, particularly in a message to a vulnerable employee group, I would conclude that the laboratory conditions have been sullied. The most important aspect of the laboratory condition is the impartiality and integrity of the Agency that is in charge of the laboratory.